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In The

Supreme Court of the United States

October Term, 1994

YOLANDA GOMEZ and MANUEL GOMEZ, MARIA VALADEZ-GONZALEZ, GERARDO VELASQUEZ and ISABEL VELASQUEZ,

Petitioners,

v.

THE HOUSING AUTHORITY OF THE CITY OF EL PASO, EDMUND CARRERA, in his capacity as Executive Director of the El Paso Housing Authority, EPHA Board of Commissioners, RODOLFO HERNANDEZ, BLANCHE DARLEY, MARGARITO RODRIGUEZ, ELLIE FENTON, RENE PENA, and PAT MICHAEL, in her capacity as Eligibility Coordinator for EPHA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, in stating their single question, have made several assumptions with which respondents disagree. These assumptions are based on only two alleged incidents involving public housing applications. Employees of the Housing Authority of the City of El Paso are said to have lost one application, and to have destroyed another.

Unlike the question stated by petitioners, the negligent and aberrant acts alleged did not occur pursuant to any policy or custom. No policy maker acted in the manner alleged. Not only were the acts unauthorized, but they were discrete and isolated incidents.

The assumption that the Housing Authority denied petitioners the right to file applications is partially true, but misleading. At the time of the incidents **no one** was permitted to file an application because the waiting list was legitimately closed.

Respondents, therefore, would expand petitioners' single question to two questions, restated as follows:

1. In the absence of an enabling policy or custom, may the loss and destruction of public housing applications, occurring only as discrete and isolated incidents, form the basis of municipal liability?

2. In the absence of an enabling policy or custom, may the loss and destruction of public housing applications, occurring only as discrete and isolated incidents, form the basis of a procedural due process violation?

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Housing Authority of the City of El Paso ("Housing Authority"); the Executive Director, Edmund Carrera; the members of the Board of Commissioners; and the Eligibility Coordinator, Pat Michael, Respondents herein,

pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

Petitioners' appendices set forth the relevant opinions of the courts below.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, of other proper proceeding for redress.

42 U.S.C. § 1437d(c)(4) provides:

> Every contract for annual contributions shall provide that -
>
> (4) the public housing agency shall comply with such procedures and requirements as the Secretary may prescribe to assure that sound management practices will be followed in the operation of the project . . .

24 C.F.R. § 960.207(b) provides:

> When a determination has been made that an applicant is eligible and satisfies all requirements for admission, including the tenant selection criteria, the applicants must be notified of

the approximate date of occupancy insofar as that date can be reasonably determined. Notwithstanding the fact that the PHA [Public Housing Authority] may not be accepting additional applications for tenancy because of the length of the waiting list, the PHA may not refuse to place an applicant on the waiting list if the applicant is otherwise eligible for assistance and claims that he or she qualifies for a Federal preference as provided in § 960.211, unless the PHA determines, on the basis of the number of applicants who are already on the waiting list and who claim a Federal preference, and the anticipated number of project admissions, that -

(1) There is an adequate pool of applicants who are likely to qualify for a Federal preference, and

(2) It is unlikely that, on the basis of the PHA's system for applying the Federal preferences, the preference or preferences that the applicant claims, and the preferences claimed by applicants on the waiting list, the applicant would qualify for assistance before other applicants on the waiting list.

24 C.F.R. § 960.211(c)(3) provides in pertinent part:

Before executing a lease with an applicant who has been offered a unit on the basis of a Federal preference, the PHA must require the applicant to provide verification that he or she qualifies for a Federal preference under paragraph (c)(1) of this section by virtue of the applicant's current status.

24 C.F.R § 960.211(k) provides in pertinent part:

Notice and opportunity for a meeting where Federal preference is denied. If the PHA determines that an applicant does not meet the criteria for receiving a Federal preference, the PHA must

promptly provide the applicant with written notice of the determination. The notice must contain a brief statement of the reasons for the determination, and state that the applicant has the right to meet with the PHA's designee to review it.

STATEMENT OF THE CASE

In their attempt to articulate a claim of constitutional dimensions, petitioners have failed to restate their individual fact situations. Their general claim is that the Housing Authority routinely denied due process to public housing applicants who had federally mandated preferences for housing. The underlying facts do not support this collective claim of constitutional deprivation.

The relevant facts presented by Manuel and Yolanda Gomez were that the Housing Authority had lost their application to rent an apartment, and then refused to reinstate them on the waiting list. *Gomez* v. *Housing Authority of the City of El Paso*, 805 F. Supp. 1363, 1365 (W.D. Tex. 1992). The basis of the claim of Isabel and Gerardo Velasquez was that they were told to come to the Housing Authority office and fill out an application, but, upon arriving and completing it, the application was rejected. *Id.* at 1365-66. According to the Velasquezes they had been led to believe they qualified for housing by one employee, only to have another employee tell them this was incorrect. The second employee tore up the application in their presence. The other original plaintiff, Maria Valadez-Gonzalez, did not appear or testify at trial.

Petitioners' suit rests on a lost application and a torn up application. The trial court was confronted with an alleged act of negligence, together with another act

which, if believed, was rude, unfeeling and aberrant. These acts, without more, could not form the basis of a constitutional infringement, and both the trial court and court of appeals so found.

The Gomez and Velasquez families were among the thousands of persons annually seeking housing from the Housing Authority. Applications are not always accepted because of the large backlog of prior applications. The Department of Housing and Urban Development ("HUD") permits closing the application process if there are more housing applicants than can be "served within a reasonable period of time." *HUD Handbook*, § 2-3(a)(1)(c).

Those persons who have already applied remain on the waiting list, but no new applications are added to the list. There must be, as the trial court found, enough applicants to fill expected vacancies for at least several months before the waiting list is closed. *Gomez*, 850 F. Supp. at 1370, citing *HUD Handbook*, § 2-3(b)(3). After getting placed on the list, the wait in El Paso is approximately three (3) years, a time period not unusual in the nation's large public housing complexes. The El Paso Housing Authority is one of the 31 large housing authorities out of some 725 authorities operating in the United States.

Applicants with federal preferences, however, may not be refused a place on the waiting list unless the housing authority "determines that there is an adequate pool of applicants likely to qualify for a Federal preference." *Id.* at 1369, citing 24 C.F.R. § 960.207(b). Virtually all El Paso applicants meet a federal preference of being 1) involuntarily displaced, 2) living in substandard housing, or 3) paying more than fifty percent (50%) of family income for rent. 24 C.F.R. § 960.204(a),(b)(4). El Paso,

without dispute, has a sufficient pool of applicants likely to qualify for a federal preference. There is no way an open application process could serve all applicants within a reasonable period of time. In short, the Housing Authority can, and does, close the waiting list. No one may apply for a given period of time, but no federal statute or regulation is violated by this necessary procedure.

It was during these closed periods that petitioners experienced their respective difficulties. The application of the Gomezes allegedly was lost, and, because the waiting list was closed, they were not permitted placement on the list. Similarly, the Velasquezes claim they were erroneously told the list was open for a one bedroom apartment, but upon arriving at the Authority's offices, were told they did not qualify. Because they were a married couple with one child, the Velasquezes should have applied for a two bedroom apartment. The waiting list for two bedroom apartments was closed. Their application allegedly was torn up, and they were told to return when applications were being accepted.

Several factual findings compromised petitioners' claims at trial. The court found that none of the petitioners had filed applications at the time the lawsuit was filed. As to the Gomezes, it was found, at the time their complaint was filed, they did not consider themselves in need of housing and that after their application was lost, no attempt was made to refile an application at the times during which applications were being accepted.

As to the Velasquezes, it was found they had called the Housing Authority once or twice a month during 1990 to inquire about housing. Their testimony was that

on November 12 or 13, 1990, having been told by telephone that housing was available, they went to the Authority and submitted an application. *Id.* at 1365-66. It was during this meeting that the application was said to have been torn up by an employee on the grounds the Velasquezes did not qualify for a one-bedroom apartment. *Id.* at 1366. The court, however, found that on those dates the waiting list for both sizes of apartments was closed. No telephone call should have been made. No application should have been accepted. This factual finding has not been challenged by the Velasquezes, and does not strengthen their testimony concerning the incident in question.

One additional factual matter, referenced above, deserves comment: the trial court's finding that it had "no evidence but that the Velasquezes' application was torn up and the Gomezes' application was lost." *Id.* at 1372. The employee charged with receiving applications testified she had never torn up an application and had never seen anyone else destroy an application. Petitioner Yolanda Gomez testified that this employee "was very nice. She wasn't rude or none of that."

The Housing Authority, in processing a large number of applications, could not, and cannot, categorically deny that its employees have never lost or destroyed an application. The Housing Authority is at a severe disadvantage in trying to disprove the specific claims of the petitioners, especially a claim of deliberate destruction of an application.

Petitioners, however, provided "no evidence, nor did they even contend, that the Authority had a policy or custom of tearing up or losing applications." *Gomez*, 805

F.Supp. at 1372. The destruction of the Velasquezes application was found to be the act of an individual employee. *Id.* The loss of the Gomezes' application was an "inadvertent, at best negligent, occurrence for which no one is to blame." *Id.* These findings are not clearly erroneous. Fed. R. Civ. P. 52(a).

The trial court required a showing that HUD admission regulations either were violated by a policymaker or by Housing Authority policy or custom. No evidence was presented that the governing board or the chief executive officer violated any such regulation. The court examined the admission policies in regard to federal preferences for public housing. Each argument of petitioners was rejected by the court. Other than finding that petitioners had made no application for housing, the court found that even had they been on the waiting list, no policy would have adversely affected them.

The claim that the placement of all persons in a single applicant pool discriminated against persons with a federal preference was held to be without merit. The practice of the Housing Authority was to verify eligibility some 30 to 60 days prior to apartment availability. Many circumstances could change from the date of application until a housing unit became available. During these months or years of waiting, income, family size, and even the need for public housing could change. HUD requires such a reevaluation. 24 C.F.R. § 960.211(c)(3).

Because of the three years average wait, it made little sense to thoroughly screen applicants at the beginning of the procedure. When housing becomes available, the 30 to 60 day period allows the Authority sufficient time to review eligibility. It also must be remembered that almost

all applicants qualified for a federal preference. Petitioners provided no evidence this procedure caused any delay for applicants with a preference.

The trial court ultimately found no evidence was produced that the Housing Authority had a policy or custom of tearing up or losing applications. The court refused to attribute the act of tearing up the Velasquezes' application to the Authority itself. The loss of the Gomezes' application was found to be inadvertent, and at best, negligent.

The court of appeals viewed the behavior of the Housing Authority employees in a harsher light, calling it "negligent or even abusive." Respondents disagree with the latter characterization, especially when a supervisor could have been called immediately by the Velasquezes to address the difficulty, and when the intake employee at trial denied tearing up anyone's application.

Nonetheless, the appellate court held that in no instance did the behavior "rise to the level of a constitutional tort cognizable under § 1983." The per curiam appellate opinion is as brief as the trial court's opinion is detailed. The result, however, is the same: no harm came to the petitioners and no federally protected right was implicated.

REASONS FOR DENYING THE PETITION

The Fifth Circuit held that no constitutional tort was worked upon petitioners. This holding is correct for several reasons, the primary one of which is factual. Applications were not being accepted from anyone when petitioners sought to be placed on the waiting list. No hearing was required to keep an applicant off the list when it was closed. Once those persons on the list were

accommodated, new applications again would be accepted, and the process would start over. This satisfied HUD regulations and federal law.

Both petitioners had logical arguments as to why they should have been placed on the list at a time when all other would-be applicants were denied access. This was especially true as to the Gomezes if their story is accepted. Their application was lost. At the time, however, there was no way to verify that an application had actually been filed. The Gomezes, therefore, were told to reapply when the application process reopened.

The Velasquezes' reasons are not as compelling, but, if their version of the facts is accepted, they were treated much more curtly than were the Gomezes. An unknown employee tore up their application when it was realized they were not eligible for a one bedroom apartment. The Fifth Circuit panel found this offensive, but not to the point of finding that a constitutional claim was stated.

The legal basis for denying the petition for certiorari is grounded equally in municipal liability cases and in procedural due process cases. Under either analysis no valid claim has been stated, and the petition should be denied.

MUNICIPAL LIABILITY

No Housing Authority Policy or Policymaker Authorized, Tolerated or Condoned the Constitutional Infringements Claimed By Petitioners

Petitioners assert a procedural due process claim. The court found that due process infringements, if any, were the acts of subordinates in contravention of established policy that passed constitutional muster. The failure to adhere to constitutional standards was not the

result of a Housing Authority policy or custom. No policymaker ratified the aberrant or negligent actions of any employee.

Liability attaches to a municipality under 42 U.S.C. § 1983 only when the municipality itself causes the constitutional violation. *City of Canton* v. *Harris*, 489 U.S. 378 (1989). *Respondeat superior* or vicarious liability theories cannot impose liability under Section 1983. *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658, 694 (1978).

Recovery is permitted only "when it can be fairly said that the city itself is the wrongdoer." *Collins* v. *City of Harker Heights*, ___ U.S. ___, 112 S.Ct. 1061, 1067 (1992). The injured party must prove "that the city was at fault for establishing the policy" which inflicted the harm. *City of Springfield* v. *Kibbe*, 480 U.S. 257, 270 (1987) (O'Connor, J. dissenting).

The cases defining municipal liability, summarized above and discussed in more detail below, put beyond dispute the correctness of the trial court's judgment and its subsequent affirmance. Neither the governing body nor the executive director injured the housing applicants. No evidence was presented that "Mr. Carrera [the executive director] or any Board Members of the EPHA [El Paso Housing Authority] violated HUD regulations or ratified the actions of an EPHA official or employee that amount to violations of HUD regulations regarding admissions and Federal preferences." *Gomez*, 805 F.Supp. at 1368-69. No policymaker caused any harm to the Gomezes or Velasquezes.

> The Supreme Court, over thirty years ago, held that:
> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.

Monroe v. *Pape*, 365 U.S. 167, 184 (1961), *quoting United States* v. *Classic*, 313 U.S. 299, 326 (1945) (plurality opinion).

The consequence of this holding was to create a federal civil cause of action and an offensive use of the Fourteenth Amendment to protect constitutional rights. *Developments in the Law-Section 1983*, 90 Harv. L. Rev. 1133, 1173 (1977). This caused the development of federal caselaw for "constitutional torts" independent of state defenses and unconstrained by state law policies. *Howlett* v. *Rose*, 496 U.S. 356 (1990).

Petitioners, at both trial and appeal, did not discuss municipal liability as it has evolved from *Monroe* v. *Pape* through *Collins* v. *City of Harker Heights*. They instead underscored the importance of *Zinermon* v. *Burch*, 494 U.S. 113 (1990), while seeking to avoid the holdings in *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and *Hudson* v. *Palmer*, 468 U.S. 517 3194 (1984). These three cases are addressed later in this brief, but, given the trial court's reliance on *City of St. Louis* v. *Praprotnik*, 485 U.S. 112 (1988), it is appropriate to first review the municipal liability cases and then proceed to the procedural due process cases. This ordering of discussion does not suggest that either the cases or the respective doctrines are at odds, *Wilson* v. *Civil Town of Clayton, Ind.*, 839 F.2d 375, 380 (7th Cir. 1988), and the separate lines of authority are divided for analysis only. Neither do the respondents attempt to reconcile every aspect of the two doctrines. The cases overlap, and often will be cited in each line of authority.

There are two "essential elements" which a plaintiff must prove in order to state a claim under Section 1983:

1. [T]he conduct complained of was committed by a person acting under color of state law, and

2. [T]his conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Parratt v. *Taylor*, 451 U.S. 527, 535 (1981).

The terms "under color of law" and "state action" are coterminous because "Congress thought it was creating a remedy as broad as the protection that the Fourteenth Amendment affords." *Lugar* v. *Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982). "[I]f a defendant's conduct satisfies the state action requirement of the Fourteenth Amendment, 'that conduct [is] also action under color of state law and will support a suit under § 1983.' " *West* v. *Adkins*, 487 U.S. 42 (1988).

The second element of a Section 1983 claim, the deprivation of rights secured by the constitution, must be read against "the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe* v. *Pape*, 365 U.S. at 187.

Individual acts, and the accompanying responsibility, take on an added dimension when performed by employees or officers of governmental units. Recognizing that governmental bodies can act only through natural persons, the Supreme Court, in *Monell* v. *Dept. of Social Services*, sought to define the circumstances when governments themselves should be held responsible for the acts of individuals. As Justice Brennan was later to note, the injurious acts must be connected to the governing body, "that is, acts which the municipality has officially sanctioned or ordered." *Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 480 (1986) (plurality opinion). In *Monell* two specific categories of governmental sanction were recognized:

1. The action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision

officially adopted and promulgated by the body's officers. *Monell,* 463 U.S. at 690.

2. The constitutional deprivation was visited pursuant to practices, not authorized by written law, that were so permanent and well settled as to constitute a "custom or usage" with the force of law. *Id.* at 690-691.

In the instant case the evidence strongly supports the finding that no official policy authorized, tolerated or condoned the losses petitioners claim to have suffered. They cannot override the "clearly erroneous" standard of review.

Monell dealt with a written policy that required pregnant employees to be placed on unpaid sick leave even though there was no medical necessity to cease working. An express policy was directed to a specific group of employees and resulted in economic loss. There was no question the policy was official and that it was the "moving force of the constitutional violation." *Monell,* 436 U.S. at 694.

Policies with the clarity of that in *Monell* have been infrequent in most litigation. For example, *Newport* v. *Fact Concerts, Inc.,* 453 U.S. 247 (1981) (vote of city council to cancel license for rock concert) and *Owen* v. *City of Independence,* 445 U.S. 622 (1980) (personnel decision made by city council) present discrete actions of the policymakers. In the absence of such a written policy and a direct result, litigants usually are "confronted with a legal landscape whose contours are 'in a state of evolving definition and uncertainty.' " *City of St. Louis* v. *Praprotnik,* 485 U.S. at 120, quoting *Newport* v. *Fact Concerts, Inc.,* 453 U.S. at 256. In *City of Oklahoma City* v. *Tuttle,* 471 U.S. 808, 820 (1985) the "theory of liability was that the 'policy' in question

was the city's police training and supervising police officers, and that this 'policy' resulted in inadequate training, and the constitutional violations alleged." Inadequate training, according to the plaintiff, resulted in the shooting death of plaintiff's husband by a city police officer.

The Supreme Court was well aware of the "wide difference" between the policy in *Monell* and the policy alleged in *Tuttle*. *Tuttle*, 471 U.S. at 822. The policy in *Monell* "in and of itself violated the constitutional rights of pregnant employees" and "only one application" of such a policy could result in liability. *Id.*

The expanded definition of "policy" urged by the plaintiff in *Tuttle* was "far more nebulous, and a good deal further removed from the constitutional violation, than was the policy in *Monell*." *Id.* Not only did it present causation difficulties, it presented definitional problems with the very word "policy." The word, according to Justice Rehnquist, "generally implies a course of action consciously chosen from among various alternatives." *Id.* at 823. He also expressed doubt as to the existence of a policy of inadequate police training unless it could be shown that "the inadequacies resulted from conscious choice – that is, proof that the policymakers deliberately chose a training program which would prove inadequate." *Id.*

The training program of Oklahoma City police officers was not in itself unconstitutional. *Id.* at 823, n. 7. In such cases "considerably more proof than the single incident will be necessary . . . to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Id.* at 823.

The requirement of a deliberate choice "with respect to the subject matter in question" was restated in *Pembaur* v. *City of Cincinnati*, 475 U.S. at 483-84, as was the continuing recognition that municipal liability is "limited to action for which the municipality is actually responsible." *Id.* at 479-80.

In the case at bar, the trial judge cited *City of St. Louis* v. *Praprotnik*, as the underlying authority to enter judgment against petitioners. Neither the board nor the executive director, Edmund Carrera, engaged in any adverse action:

> In order to find the EPHA liable, Plaintiffs must show by a preponderance of the evidence that there existed a policy or custom by EPHA which violated HUD regulations regarding admissions and federal selection preferences or that Edmund Carrera or one of the Defendant EPHA Board Members was personally involved in such a violation, which would in turn cause EPHA to be liable as Mr. Carrera and the Board Members are policymakers for the EPHA.
> *Gomez*, 805 F.Supp. at 1368, citing *Praprotnik*, 485 U.S. at 123-127.

Praprotnik clarified the constitutional parameters of municipal policy and liability. The plaintiff claimed he had lost his job because of his exercise of First Amendment rights. Justice O'Connor reiterated much of the plurality opinion of *Pembaur:* 1) the acts for which a municipality is responsible must have been officially sanctioned or ordered, 2) only officials with final policymaking authority are subject to governmental liability, 3) the actual officials who possess final policymaking authority is a question of state law, and 4) the challenged action "must have been taken pursuant to a policy adopted by officials responsible for making policy in *that*

area of the city's business." *Praprotnik,* 485 U.S. at 123 (emphasis original).

The exercise of discretion by an employee cannot be confused with conferring policymaking authority:

> If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability.
> *Id.* at 126.

State law allocates policymaking authority among particular individuals and bodies. *Id.* at 928. In Texas, management of housing authorities is placed in the governing board which hires an executive director or other chief executive officer. Tex. Loc. Gov't Code § 392.051. Neither the Housing Authority board nor its executive director violated HUD admissions policies and federal selection preferences. *Gomez,* 805 F.Supp. at 1368. No local policy or custom violated a federally protected right. *Id.*

In *City of Canton* v. *Harris,* 489 U.S. 378 (1989), the issue of the failure to adequately train employees was again addressed. As with the police training policy in *Tuttle,* the Canton, Ohio policy of medically treating arrestees was facially constitutional. The city sought to defend on this ground by arguing Section 1983 liability attaches only where the policy is itself unconstitutional. This was rejected, and the Court concluded "that there are limited circumstances in which an allegation of 'failure to train' can be the basis for liability under § 1983." *Id.* at 387. See also, *Languirand* v. *Hayden,* 717 F.2d 220, 227-228 (5th Cir. 1983).

The imposition of liability, however, requires a high degree of fault. In "failure to train" cases liability would be permitted only when the failure "amounts to deliberate indifference to the rights of persons with whom the

police came into contact." *Canton*, 489 U.S. at 388. The basis for liability in such cases may be traced to the "deliberate choice to follow a course of action," mentioned in *Pembaur*, 475 U.S. at 483-484, and the "conscious choice" referred to in *Tuttle*, 471 U.S. at 823. The Housing Authority exhibited no deliberate indifference to any applicant for public housing.

In comparing deliberate indifference to gross negligence the majority opinion in *Canton* referred to these two standards as causing a "substantial division" among the lower courts. The court then opted for the higher standard. Gross negligence is not enough to impose Section 1983 liability on municipalities. *Canton*, 489 U.S. at 388, n. 7. The concurrence also emphasized the "high degree of fault before an omission that is not in itself unconstitutional can support liability as municipal policy under *Monell*." *Id.* at 396 (O'Connor, J. concurring). Not even ordinary negligence can be attributed to the policymakers at the Housing Authority.

Negligence alone, in any constitutional claim, is not enough to establish governmental liability. *Daniels* v. *Williams*, 474 U.S. 327 (1986) held:

> [I]n any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right, merely negligent conduct may not be enough to state a claim.

Under *Canton* the standard is even higher than gross negligence. In the case at bar neither form of negligence can be imputed to the policymakers.

Interpreting the causation requirement of § 1983 as the equivalent of the standard of care requirement first enumerated in *Monroe* v. *Pape*, the Supreme Court again unequivocally concluded that "negligence . . . alone is not sufficient to satisfy the causation requirement of Section

1983." *City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987). Negligence is not the standard of care in these types of Section 1983 cases and will not implicate Fourteenth Amendment protections.

The housing applicants herein can establish no affirmative link between the policymaking officials and the claimed injuries. The question of causation "is a difficult one; one that has left this Court deeply divided in a series of cases that have followed *Monell*." *Canton*, 489 U.S. at 385-86. The official policy, still must be "affirmatively linked," *Tuttle*, 471 U.S. at 823, to the injury, or constitute the "moving force," *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981), behind the violation.

Causation cannot be examined without reference to the appropriate standard of care, or as Justice White stated "the degree of fault." *Canton*, 489 U.S. at 388. From the conscious choice" from among various alternatives of *Tuttle*, 471 U.S. at 823, to the "deliberate indifference" of *Canton*, 489 U.S. at 388, a plaintiff must prove by substantial evidence the culpability of the policymaker. No such proof was offered in the case at hand. Neither the board of commissioners nor the executive director were deliberately indifferent to the constitutional rights of persons applying for low cost public housing.

PROCEDURAL DUE PROCESS

No Procedural Due Process Deprivation Occurred In That (1) The Loss Or Destruction Of Housing Applications Is Unpredictable And Unforeseeable, (2) Predeprivation Procedures Would Be Impotent To Counter Such Conduct, (3) The Conduct Is Not Within The Authority Of The Offending Housing Authority Employees, And (4) Adequate Remedies Exist To Correct Any Deprivation

The petitioners largely ignore the cases dealing with municipal liability, mentioning *Praprotnik* only to argue its inapplicability. They instead turn to *Zinermon* v. *Burch*, 494 U.S. 113 (1990), a case that has led one jurist to write that the decision "undoubtedly complicated an already overloaded procedural due process jurisprudence." *Caine* v. *Hardy*, 905 F.2d 858, 863 (5th Cir. 1990) (Jones, J., dissenting) *opinion superseded by Caine* v. *Hardy*, 943 F.2d 1406 (5th Cir. 1991) (*en banc*).

Another judge, writing in regard to a proposed interpretation of *Zinermon*, stated that if the reading were correct then "a line of precedent already resembling the path of a drunken sailor may [be taking] a new turn." *Easter House* v. *Felder*, 910 F.2d 1387, 1409 (7th Cir. 1990) (Easterbrook, J., concurring). In general, the application of *Zinermon* is not an easy task even though the facts in the case at hand make the task less difficult, no matter how circuitous the route. The destination, however, may be described with clarity: *Zinermon* is not applicable.

The discussion of *Zinermon* requires reference to *Parratt* v. *Taylor*, 451 U.S. 527 (1981) and *Hudson* v. *Palmer*, 468 U.S. 517 (1984). *Parratt* held that unauthorized and random acts of negligence by public employees do not give rise to procedural due process claims if the state provides

adequate post deprivation remedies. *Parratt* was partially overruled by *Daniels* v. *Williams*, 474 U.S. 327 (1986) that held, as discussed previously, that mere negligence cannot support a due process claim.

Parratt dealt with the negligent loss of a prison inmate's mail-order hobby materials, valued at $23.50. The Supreme Court held that a random and unauthorized act, negligent at best, would not constitute a violation of the Fourteenth Amendment.

Hudson extended the *Parratt* holding to the intentional destruction of a prisoner's property during a cell search. One of the guards conducting a routine "shakedown" search allegedly destroyed noncontraband possessions of the prisoner. The wrongful act of the guard, assumed to be true for summary judgment purposes, was found to be random and unauthorized, an act "[t]he state can no more anticipate and control in advance . . . than it can anticipate similar negligent conduct." *Hudson*, 468 U.S. at 533.

Post deprivation remedies under state law existed: a common law state court action and/or a prison grievance procedure. *Id.* at 530 and 534-35. The "controlling inquiry" was whether the state could provide a predeprivation process." *Id.* at 534.

Due process considerations, of course, are applicable only if life, liberty or property are implicated. Respondents do not concede that a housing application, even if lost or destroyed, is a property interest.

While an application is the first step in obtaining admission to housing, an application, especially in the context of petitioners' appellate claims, is difficult to define as property. In and of itself it cannot be raised to constitutional dimensions. Even if an application may be

defined as property it does not require full procedural due process.

Since *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) the definition of property has centered on entitlement:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Certainly the mere filing of an application cannot be said to create a legitimate expectancy of admission to public housing. No claim of entitlement exists at this point; no benefit has yet attached.

Unlike the welfare recipients in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) or the students in *Goss* v. *Lopez*, 419 U.S. 565 (1975), public housing applicants have not yet received a benefit at the time of application. Unlike the plaintiffs in *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U.S. 418 (1987), the petitioners herein were not already tenants.

In reference to another section of the Housing Act, the Ninth and Seventh Circuits have dealt with claims asserting due process rights to Section 8 subsidized housing. 42 U.S.C. § 1437f. In *Ressler* v. *Pierce*, 692 F.2d 1212, 1214 (9th Cir. 1982) the court found applicants for Section 8 benefits were entitled to due process protection. The contrary was held by the Seventh Circuit in *Eidson* v. *Pierce*, 745 F.2d 453 (7th Cir. 1984).

The Seventh Circuit examined whether there was a "legitimate claim of entitlement" to the Section 8 benefits. Using *Board of Regents* v. *Roth* as a guide the court found that persons on waiting lists had no constitutionally protected property interest.

The creation of a property interest in a federal loan application was rejected in *Shaner* v. *U.S.*, 976 F.2d 990 (6th Cir. 1992). The claim of a property right in an FmHA emergency loan, for which application had been made, was found to be too speculative to be considered property. *Id.* at 995. Similarly, in *Nelson* v. *U.S.*, 16 Ct. Cl. 510 (1989), the court held no property right existed until the loan was approved and a contractual right resulted. In *Ashbrook* v. *Block*, 917 F.2d 918, 924 (6th Cir. 1990) it was held that no property right exists to additional FmHA funding.

The trial court, however, held that petitioners as housing applicants, could sue to enforce federal admissions requirements. Citing *Henry Horner Mothers Guild* v. *Chicago Housing Authority*, 780 F.Supp. 511, 516 (N.D. Ill. 1991), the court found suit could be brought by applicants and "those persons who have attempted, but been unable, to get on the waiting list because of alleged violations of HUD regulations . . . " *Gomez*, 805 F.Supp. at 1368.

While respondents herein do not embrace this legal conclusion in the present fact situation, they have not directly contested it on appeal. No issue has been raised because the court correctly applied *Praprotnik*, and required a showing of a policy or custom which violated HUD regulations.

If it is assumed a property interest is involved, the most obvious postdeprivation remedy in the case at hand

would have been to have complained to a supervisor. Failing resolution at that level, the Gomezes and Velasquezes could have brought their respective complaints to the attention of the executive director and/or the board of commissioners. Board meetings are open to the public. Tex. Gov't Code § 551.001. All Texas residents may petition local governmental subdivisions. *Professional Association of College Educators* v. *El Paso County Community College District*, 678 S.W.2d 94, 95 (Tex. App. – El Paso 1984, writ ref'd n.r.e.).

Common law damages or equitable relief could have been sought in the appropriate state forum, although the most expeditious relief could have come from upper management or the board itself.

These potential remedies for the loss or destruction of an application should not be confused with other review rights. Prior to executing a lease the Housing Authority must require an applicant claiming a federal preference to verify same. 24 C.F.R. § 960.211(c)(3). If the preference is denied, the applicant is given the right to review the denial with a Housing Authority designee. 24 C.F.R. § 960.211(k).

Petitioners claim this right of review must be given at the time the initial application is made. This is not what the regulations require, and the absence of such a premature and needless procedure harms no one.

Zinermon, 494 U.S. at 132, recognized the inability in certain circumstances of the state "to provide predeprivation process because of the random and unpredictable nature of the deprivation." *Zinermon*, however, involved a state procedure involving the risk of confinement in a state mental institution. The risk of a liberty deprivation

was heightened because the potential patients were permitted to voluntarily commit themselves to the institution.

Darrell Burch "voluntarily" committed himself to a state mental health treatment facility. Upon his release after five months confinement, Burch claimed that a hearing should have been conducted prior to his confinement, and that to confine him without such a hearing, violated his due process rights.

The *Parratt/Hudson* doctrine was offered, and rejected, as a defense to Burch's claims. According to the *Zinermon* majority, a predeprivation procedure could have been implemented much like the involuntary commitment procedure the state had already in place. Moreover, the statutory scheme authorizing commitment required informed consent by a competent person, but there was no method to ascertain competency. It was, in the words of Justice Blackmun, "hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent, and that state officials with the power to admit patients might take their apparently willingness to be admitted at face value and not initiate involuntary placement procedures." *Id.* at 136.

In *Parratt* the very nature of the deprivation made a predeprivation hearing an act "border[ing] on the absurd." *Id.* at 989, quoting *Daniels* v. *Williams, supra,* 474 U.S. at 342, n. 19. In *Hudson* it would have been equally "absurd to suggest that the State hold a hearing to determine whether a guard" could maliciously destroy a prisoner's property. *Zinermon,* 494 U.S. at 137.

The *Zinermon* court could not characterize the conduct of the defendant hospital employees as "unauthorized" as the term was defined in *Parratt/Hudson. Id.* at 138. The prison

officials in *Parratt/Hudson* "had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate (for persons unable to protect their own interests) the procedural safeguards required before deprivations occur." *Id.* Predeprivation safeguards would have been of use in *Zinermon*, but would have been futile in *Parratt/Hudson*.

The majority opinion in *Zinermon*, 494 U.S. at 124-128, begins its legal analysis with *Monroe* v. *Pape*, 365 U.S. 167 (1961), and proceeds to review the test in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Predeprivation hearings are said to be the norm, with the *Parratt/Hudson* doctrine being an exception. In such a special circumstance "postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the state could be expected to provide." *Zinermon*, 494 U.S. at 128. This, however, does not mean *Parratt/Hudson* has been abandoned. As will be discussed, *Parratt/Hudson* is itself a result of *Mathews* balancing.

The Fifth Circuit Court of Appeals, in applying the *Zinermon* decision, has found "three preconditions for the application of the *Parratt/Hudson* doctrine: the deprivation must truly have been unpredictable or unforeseeable; the predeprivation procedures must have been impotent

to counter the state actors' particular conduct; and the conduct must have been 'unauthorized' in the sense that it was not in the officials' express or implied authority." *Caine* v. *Hardy*, 943 F.2d 1406, 1413 (5th Cir. 1991) (*en banc*).

Zinermon, however, did not alter the balancing of the personal and state interests described in *Mathews* v. *Eldridge*. *Caine*, 943 F.2d at 1413. The *Zinermon* majority, according to *Caine*, "characterizes its analysis as an application of the *Parratt/Hudson* doctrine which in turn implemented *Mathews* balancing." *Id*. This is demonstrable when the facts of the instant case are measured against the *Mathews* factors.

The first factor of defining the private interest that will be affected by the official action is apparent: the right to apply for public housing. The second involves the risk of erroneous deprivation through present procedures and the value, if any, of added procedures. Current procedures do not call for losing or destroying applications. It is stressed petitioners are complaining about a procedure that does not grant a predeprivation hearing before losing or destroying applications. The review process employed after a preference is denied is not challenged. Petitioners wish to implement the review at the time of the intake interview, not at the time an apartment becomes available as presently allowed. 24 C.F.R. §§ 960.207(a); 960.211(k); EPHA Statement of Policy.

No one is authorized to destroy or lose applications. The employee charged with receiving applications testified she had never destroyed an application nor had she seen any other employee do so. Intake personnel and the eligibility officer were not acting under "a standardless grant of authority," *Bigford* v. *Taylor*, 834 F.2d 1213, 1222

(5th Cir. 1988), but under a policy which called for the receipt of applications, followed by the evaluation of eligibility at a later time. An added procedure would be as pointless as a new regulation requiring a hearing before losing or destroying prisoners' property.

The final *Mathews* factor speaks to the government's interest and the burden an additional or substitute procedure would entail. This factor, given the facts at hand, is closely related to the second factor. Such a procedure could not be made to work and would interfere with the governmental interest to provide housing to qualified applicants. The diversion of resources to a pointless procedure would serve no interest of the government or persons in need of public housing.

The application of the *Mathews* balancing test leads not to *Zinermon*, but to *Parratt/Hudson*. Indeed, the balancing of the *Mathews* factors is tantamount to an application of *Parratt/Hudson*. It cannot be predicted when an employee might engage in an unauthorized or negligent act. The Housing Authority " 'cannot be required constitutionally to do the impossible by providing predeprivation process' to stem aberrant, unpredictable conduct." *Caine*, 943 F.Supp. at 1412, quoting *Zinermon*, 110 S.Ct. at 985.

Finally, it was found at trial that no adverse action by an employee was taken pursuant to established procedure. All acts alleged to have harmed the housing applicants were random. The Gomezes had their application lost while the Velasquezes were erroneously told to come in at a time when applications were not being accepted. The Velasquezes application then was torn up. As to the Velasquezes, the trial court found the application period had expired, and even if the period had been

impermissibly extended it would have not benefited them.

Petitioners, even if damaged, were not injured by an official regulatory or procedural scheme that resulted in the destruction of a property interest. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), is not applicable. In the context of a procedural due process claim, *Parratt/Hudson* does apply, and the judgments of the trial court and court of appeals may be affirmed on this alternate ground.

CONCLUSION

Municipal liability may be imposed only when an injury is caused by a policymaker or inflicted under a policy or custom. No injury was established in the instant cause; no policy or custom permitted negligent or aberrant behavior; and no policymaker acted in a negligent or aberrant fashion.

The isolated acts of losing or destroying a housing application, even if an application is a specie of property, cannot form the basis of a procedural due process claim. A hearing to permit the impermissible is as illogical as it is bizarre. No procedure can sanction human oversight or petty behavior.

The Housing Authority's overall application process, from its maintenance of a waiting list, to its review procedures for federal preferences, satisfies federal law and

regulation. For these and the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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